

THE HUMAN RIGHTS CODE, 1981

IN THE MATTER OF a Board of Inquiry appointed under section 37 of the Human Rights Code, 1981, c.53 as amended.

AND IN THE MATTER OF the Complaint made by John Alexander Coubrough dated February 6, 1986 alleging discrimination in employment on the basis of Handicap by The Board of Police Commissioners for the City of Brantford and Brantford Police Force and Mr. John Weir, Chief of Police and Mr. Alvin Barber, Deputy Chief of Police;

BEFORE: A Board of Inquiry comprised of:

Jeff House

APPEARANCES: Ontario Human Rights Commission

Fiona Campbell

Complainant

John Alexander Coubrough

Respondent

Paul D. Amey

PRELIMINARY MOTIONS

This matter came before me, sitting as a Board of Inquiry, on October 5th, 1992. I had been appointed by the Minister of Citizenship on August 18, 1992 to inquire into a complaint pursuant to the Human Rights Code, made by John Alexander Coubrough, dated February 6, 1986, alleging discrimination in employment on the basis of handicap .

In a conference call held August 31, 1992, counsel for the Respondents indicated that they would be applying to the Divisional Court for an Order prohibiting me from proceeding with an inquiry into this matter, an Order quashing the decision of the Human Rights Commission to appoint a Board of Inquiry, an interlocutory restraining order, and an order declaring that the Human Rights Commission is without jurisdiction to take further steps with respect to this matter.

The Respondent's application was in fact made to the Divisional Court, and was heard on or about September 24th, 1992. At that time, the Human Rights Commission made a corresponding application to quash the applications for judicial review, on the basis that they were premature, and on the basis that it is the duty of the Board, not the Court, to decide an application of this nature in the first instance.

I have been provided by counsel for the Respondents with the text of Justice O'Leary's decision in this matter. In essence, Justice O'Leary held that the applications were to be argued first before the Board of Inquiry. He agreed with Commission counsel, and quashed the application for judicial review.

Both counsel took the position before me that I had the jurisdiction to give effect to each of the Respondent's arguments, if I were of the view that they were meritorious.

Those arguments were two. First, it was argued that due to the delay in these proceedings, there was what amounted to an abuse of process, which ought to lead to stay the proceedings.

Secondly, it was alleged that the matter is res judicata. Mr. Amey for the Respondents argued that, since an identical issue had already been decided against the Complainant by the Brantford Board of Commissioners of Police and then by the Ontario Police Commission, I ought to stay the inquiry into the complaint before me

DELAY

The history which Mr. Amey cited as being relevant to the question of delay was set out in the motion record filed in Divisional Court, and was made an Exhibit on the motion before me.

The relevant facts were these:

1. P.C.A. Coubrough was a police constable for the Brantford Police Service from September, 1966 to January 3, 1984;
2. As a result of an inquiry sustained in the course of his duties, Coubrough was off work from January 3, 1984;
3. By letter of February 6, 1985, Coubrough complained to the Ontario Human Rights Commission;
4. In March of 1986, the Respondent held a hearing pursuant to s.27(c) of Reg. 791 to the Police Act to determine whether Coubrough was "due to physical disability, incapable of performing his requirements of his position";
5. Following such hearing, the Respondent placed Coubrough on retirement;
6. By decision made January 9, 1987, the Ontario Police Commission dismissed Coubrough's appeal from such decision of the Respondent;
7. By Judgment made March 7, 1988, the Divisional Court dismissed Coubrough's application for judicial review from the decisions of the Applicant and the Ontario Police Commission;
8. By letter of November 6, 1987, the Ontario Human Rights Commission refused to dismiss the complaint pursuant to s.33 of the Ontario Human Rights Code, as requested by the Respondent;
9. The Ontario Human Rights Commission's investigation officer first contacted the Respondent in February of 1991. The investigator prepared a Case Summary in February of 1992 recommending the appointment of a Board of Inquiry to determine if Coubrough was "incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of (physical) handicap".
10. By letter of February 27, 1992, the Respondent requested that the Ontario Human Rights Commission not appoint a Board of Inquiry pursuant to s.36 of the Ontario Human Rights Code;

11. By letter of June 19, 1992, the Ontario Human Rights Commission advised the Respondent of its request to the Minister of Citizenship to appoint a Board of Inquiry.

12. By letter of August 18, 1992, the Minister of Citizenship appointed me as a Board of Inquiry.

Mr. Amey indicated at the outset that he was not relying on any constitutional arguments with respect to delay, nor was he submitting that witnesses or evidence had disappeared or gone missing. Rather, it was his submission that delay of such length as in this case prejudices the right to a fair hearing. The inordinate length of time, he submitted, would necessarily erode the memories of the witnesses, thus rendering it impossible treat the parties fairly.

He referred me three cases which, he said, recognised the principles which he was urging upon me. The first, Ontario College of Art and Jan Van Kampen v. Ontario Human Rights Commission, an unreported decision of Somers, J. in weekly court, dated August 5, 1992, was an application for an interim stay of a Board of Inquiry's proceedings, to allow the full Divisional Court to deal with the application for a stay due to delay. Since the question before me, that is, whether to stay the hearing permanently, was not before Somers, J., I find that it is of limited assistance.

The other two cases referred to in argument were Dominion Management v. Velenosi (1992) 5 O.R. (3rd) (Div. Ct.) and Re Commercial Union at al and Ontario Human Rights Commission et al. (1987) 59 O.R. 481.

The Velenosi case includes a strong statement of rebuke from the Divisional Court with respect to the attitude shown toward delay by Commission counsel, and by the Board of Inquiry. It is clear, however, that the actual decision was based on other principles, and that the comments concerning delay are obiter dicta.

In Commercial Union, a decision of a Board of Inquiry was quashed. There, a lengthy delay was compounded by the death, during the period of delay, of a key witness, the supervisor of the complainant at all material times. As well, there was an unrelated breach of the duty of fairness owed the Respondent by the Commission, which had, in effect, withheld evidence from the Respondent.

Mr. Amey urged, as I understood him, that there was no objection to the fact that the Human Rights Commission had awaited the outcome of the proceedings under the Police Act, and that there was no objection to the period of time from 1991 to date, when the Commission was actively investigating the file. However, he did object strenuously to the three year period following the decision of the Divisional Court, on the basis that there was no conceivable

excuse for Commission inaction during those three years, if they had, in fact been postponing action pending the end of the Police Act proceedings.

Ms. Campbell, for the Commission, pointed out the line of case law beginning with Hyman v. Southam Murray Printing (1983) 3 C.H.R.R. D/1617, which had held that a complaint ought not to be dismissed for delay unless the delay had made it possible for the Board to reach a fair conclusion of its mandate on the merits.

It is my view that, although the delay here has been egregious, it is not a proper case in which I should dismiss the complaint at the outset. Because the Brantford Police is a body corporate, delay affects it, in this case at least, less onerously than would be the case of an individual. This is especially true since I have been assured that no witnesses are unavailable, and that elements of the case have been preserved in medical reports and the like. It is my view that no prejudice has been occasioned by delay in this matter, although delay is always to be regretted. I do not find that it would be oppressive for the Brantford Police Department to respond to this complaint, even given the lengthy delay.

RES JUDICATA

Mr. Amey submitted as well that I was without jurisdiction to proceed due to the doctrine of res judicata.

That doctrine, he agreed, required that he bear the burden to satisfy me on all essential points of the doctrine, which, he submitted, were set out in Spencer Bower and Turner, The Doctrine of Res Judicata, London, Butterworths, 1969 at p.18-19 .

Those elements are as follows:

It must be established

- (i) that the alleged judicial decision was what in law is deemed such;
- (ii) that the particular decision relied upon was in fact pronounced;
- (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
- (iv) that the judicial decision was final;
- (v) the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised; and
- (vi) that the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised..."

It was common ground that the first four of the elements were true, and had been established. Both the fifth and the sixth point were in issue.

Did the previous judicial decision involve a determination of the same question as that before me?

Mr. Amey provided me with a copy of the Motion Record prepared for the Divisional Court, which was made Exhibit 3 on the motion before me. That document contains, among other things, the affidavit of Chief Barber of the Brantford Police, and the reasons for judgment

by the Chairman of the Commissioners of Police for the City of Brantford, the reasons of the Ontario Police Commission, on appeal, and the reasons of the Divisional Court upon judicial review.

Ms. Campbell for the Human Rights Commission provided me with the Commission's Motion Record, which included the cross examination upon the affidavit of Chief Barber.

While these materials have been of assistance to me, it is my view that a careful comparison of the two statutes indicates clearly that the same question as is before me was not before the Chairman of the Commissioners of Police, nor the Ontario Police Commission.

First of all, I am to inquire into and decide a complaint with respect to discrimination in employment, made by Mr. Coubrough. Under the Human Rights Code, he has the right, under s. 5, to equal treatment with respect to employment, without discrimination because of, among other things, handicap. "Handicap" is broadly defined to include "any degree of physical disability". It is clear from the materials that Mr. Coubrough suffered an injury while on duty, and that some degree of physical disability resulted. The parties disagree as to whether that physical disability was such as to require his retirement from the Brantford Police Force.

S.17 of the Code reads as follows:

"A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right."

This is to be compared to the wording of the relevant Regulation under the Police Act, as follows:

1. POLICE ACT REGULATIONS, R.R.O. 1980, Reg. 791;:

s. 27 "No Chief of Police, Constable or other Police Officer is subject to any penalty under this Part except after a hearing and final disposition for a charge an appeal as provided by this Part, or after the time for appeal has expired, but nothing herein affects the authority of a Board or Council..."

- (e) to discharge or place on retirement, if he is entitled thereto, any member of the force who, on the evidence of two legally qualified medical practitioners is, due to mental or physical disability, incapable of performing his duties in a manner fitted to satisfy the requirements of his position but any decision of the Board or Council made pursuant to this clause may be appealed to the Commission."

It will be immediately apparent, upon comparison of the two legislative instruments, that they do not refer to the same "duty".

Under the Police Act, a person may be discharged or placed on retirement if he is incapable of performing the duties associated with his position.

In contrast, under the Human Rights Code, a person must be able to perform or fulfil the essential duties or requirements attending the exercise of the right to employment without discrimination. The duties attending that right may not be the same as the duties associated with the position held, but may be the different duties to which one is entitled by the doctrine of accommodation.

I am strengthened in this conclusion by a perusal of the reasons of the administrative tribunals which first considered the matter of Cpl. Coubrough's dismissal.

Chairman P. Randorff rejected tailoring a special light duty function within the position of First Class Constable, "as it would impair the efficiency and operation of the Department".

The Ontario Police Commission dealt with the matter as follows: "Unfortunately, there are no alternative positions on the Brantford Police for Constable Coubrough. There are not available such jobs as are sometimes called "light duty". With the civilianization of some functions in the police force officers with disabilities cannot be absorbed into office positions as may have been the case in past years. To otherwise oblige police forces to keep on staff persons who cannot perform their duties is untenable."

It does not appear to me that the scope of the right to employment without discrimination was ever considered in the proceedings under the Police Act. Rather, in my view, Chairman Randorff was dealing only with Mr. Coubrough's ability to perform the duties associated with his position at that time, a very different thing.

having decided that the question asked is a different one from the one decided under the Police Act, it is my view that the motion for a finding of res judicata fails on that basis alone.

Were it necessary for my decision, I would also have found that the absence of the Human Rights Commission as a party, and the much narrower remedial procedures available under the Police Act make this proceeding much different than the one already undertaken, even though they may be closely related in terms of their subject matter.

I therefore find that neither of the arguments proposed by Mr. Amey upon the motion are of merit, and I rule that I have jurisdiction to hear this complaint.

JEFFRY A. HOUSE

OCTOBER 13, 1992